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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY
(a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

In presenting a statement of the case for the purposes of this Court, it is first proper to set forth the stipulation upon which the cause was submitted to the lower Court, and the question therein propounded to that Court which received its affirmative answer. The stipulation follows:

STIPULATION FOR SUBMISSION OF CAUSE.[1]

It is hereby stipulated that the above named cause may be submitted to the Court for determination on the following question of law, to-wit:

1. Ap. 70-73.

Where the respondent's and cross-libelant's vessel *loaded an entire cargo of lumber, including a deck load, belonging to libelant's assignor,* as per charter party* marked "Exhibit A"[2] *and bills of lading* in the form marked "Exhibit B"[3] attached hereto, and the *freight thereon was prepaid and considered as earned* upon the loading thereof, and the vessel thereafter proceeded on her voyage with all of said cargo on board and in the course thereof she *experienced heavy weather which caused her to leak and to jettison her deck cargo* and *to put into a port of distress* for the safety of the vessel and remaining cargo, *where she* arrived, discharged the same and *made repairs* upon the completion of which she reloaded the said remaining cargo and *took a new deck cargo to replace the jettisoned deck load* and *received a new and additional freight therefor,* and thereupon proceeded upon her voyage and arrived at her port of destination and there safely delivered her cargo, and the vessel and cargo re-

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*The lumber shipment was made by the charterer, Comyn, Mackall & Co., who then and there sold and transferred the cargo to Smith Kirkpatrick & Co., Inc. (Libel., Art. IV, Ap. p. 3; Answer, Art. II, Ap. pp. 8, 9), Smith Kirkpatrick & Co., being the libelant's assignor referred to in the stipulation.

2. Charter Party, Ap. 74.

The following is one of the provisions of the charter party not recited in terms in the stipulation:

"P. General average, if any, payable as per York-Antwerp Rules of 1890."

[Rule 1 of the York-Antwerp Rules of 1890 provides in part as follows:

"Rule 1. Jettison of Deck Cargo. No jettison of deck cargo shall be made good as general average." (Lowndes' General Average, 6th Edition, p. 811.)]

3. Bill of Lading, Ap. 75, 76, providing: "Average as per York-Antwerp Rules, 1890, and other conditions and exceptions as per charter party."

maining on board after the aforesaid jettison being liable to contribution in general average ratably for the cost and expense of putting into the port of distress and the general average repairs to the said vessel, and such other general average expense incurred until she was again upon her voyage to her port of original destination, and where the cargo owner prior to taking delivery of the cargo signed a document a copy of which is hereto attached marked "Exhibit C"[4] and a statement of general average was thereafter made, a copy of which is hereto attached and marked "Exhibit D"[5], and made a part hereof, without prejudice to any right libelant may have to question the correctness of said statement or to any right respondent may have to claim that the same is not subject to question, the intention of the parties hereto being that this cause is submitted on the following question of law:

(Question)

Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned.

It is further stipulated that if the vessel and her owners are liable to the cargo owners for a contribution in general average then the respond-

4. Average agreement, Ap. 76-79.

5. Statement of General Average, Ap. 80-99.
The Statement of General Average fails to credit the new freight received at the port of distress for the new deck load pro rata to the ship and saved cargo.

ent and cross-libelant is liable to the libelant and cross-respondent for the same.

It is further stipulated that if the cargo is liable for any general average contribution to the vessel and her owners then that the libelant and cross-respondent is liable to the respondent and cross-libelant for the same.

It is further stipulated that *if the Court shall answer the above question of law in the affirmative,* such interlocutory *decree may be entered in favor of the libelant* with a reference to the United States Commissioner as the Court may deem proper.

It is further stipulated that should the Court answer the question of law in the negative, such decree may be entered as the Court may deem proper.

The interlocutory decree[6] resulting from the Court's affirmative answer to the question propounded referred the cause to a Commissioner to ascertain and report the gross amount of new freight received by the respondent and cross-libelant at the port of refuge, to deduct from the amount thereof the total amount of general average expenses as found by the Court in its interlocutory decree, and to prorate the balance of the new freight thereafter remaining between the libelant and cross-respondent and the respondent and cross-libelant, in proportion as the contributory value of the vessel and cargo each bear to the whole contributory value.

6. Ap. 99, 100.

The Commissioner found the gross amount of new freight to be $21,191.15, and after deducting the amount of general average expense as found by the District Court, to-wit, $8317.62, apportioned the balance, $7199.18 to the appellee herein, owner of the underdeck cargo, and $5674.35 to the appellant, the ship owner. Thereafter, upon hearing, the Court overruled exceptions filed by the appellant to the finding of the Commissioner and entered its final decree in favor of the appellee for $7199.18.[7]

The facts as stipulated present a case where the appellant Pacific Freighters Company chartered the whole of their vessel with the right of carrying cargo on deck, for the carriage of an entire cargo of lumber from Port Blakeley, Washington, to Capetown, Africa. On the loading of the cargo the charterer sold the same C. I. F. with full shipping documents attached, which included the charter party, to Smith, Kirkpatrick & Co., the assignor of St. Paul Fire & Marine Insurance Company, the appellee herein. Under the terms of the shipping contract the freight on the lumber was prepaid, considered earned, upon the loading of the vessel, vessel lost or not lost, and general average, if any, was payable as per York-Antwerp Rules of 1890.

The vessel with a full cargo proceeded on her voyage, and during the course thereof encountered heavy weather, necessitating the jettison of the entire deck cargo and the immediate seeking of the port of San Francisco as a port of distress, where she dis-

7. Ap. 109-111.

charged the entire remaining cargo and made repairs. She then reloaded the saved cargo and at the same time loaded a new deck cargo in the space occupied by that cargo which had been jettisoned, receiving a new and additional freight therefor, amounting to the sum of $21,191.15. She then safely completed the remainder of her voyage to her destination.

Upon arrival of the vessel at destination, in order to obtain the delivery of their cargo, appellee's assignor signed an average agreement wherein it was provided that it would pay

> "all losses and expenses which shall be made to appear to be due * * * from us * * * according to the part or share in the said * * * cargo which * * * belongs to us * * * *provided that such losses and expenses shall be stated and apportioned in accordance with the established usages and laws in similar cases * * *.*"

The cargo was thereupon delivered to the owners and a statement of general average thereafter made, in which statement the average adjusters failed to credit the new freight of $21,191.15 received at San Francisco, the port of distress, for the new deck load carried in the space formerly occupied by the cargo which had been jettisoned, pro rata to the ship and saved cargo.

In this situation the lower Court determined the rights of the parties and answered affirmatively the following question of law, to-wit:

> "Is the said vessel and her said remaining cargo entitled to be credited pro rata for such extra freight received by said vessel and her

owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

From this affirmative answer of the Court, the appellant has taken its appeal.

THE QUESTIONS INVOLVED.

The appellant has raised but two questions by its appeal, viz.:

a. Did the lower Court by its affirmative answer thereto correctly decide the following question:

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

b. A question as to the propriety of the order of the Court whereby it directed the gross new freight received at the port of distress to be prorated, and not the net new freight.

SUMMARY OF ARGUMENT.

First: The new freight should be prorated between the vessel and her cargo in general average.

(1) The principle of general average is an equitable doctrine seeking to place persons interested in the common venture, so far as may be, in the same

relative position which they occupied before the peril which caused the general average act was met.

The Strathdon, 94 Fed. 206 (D. C. N. Y., Thomas, J.), affirmed 101 Fed. 603, C. C. A. 2nd;

Lowndes on General Average, 6th Edition, p. 358;

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 415, p. 592.

(2) The shipowner may not by jettison be in any wise a gainer.

Gourlie on General Average, p. 488.

(3) The new freight *was earned by a general average act.* The jettison of the cargo and the putting in to a port of distress was a general average act, and the opportunity to earn the new freight was occasioned thereby.

Barclay v. Stirling, 5 M. & S. 6, 105 Eng. Rep. 954;

Chellew v. Royal Commission of the Sugar Supply, 2 K. B. (1921) 627.

(4) General average does not alone relate to contribution. The District Court correctly directed the distribution of moneys received, which is in consonance with the principles of general average, and is no more than a crediting of such moneys. Such credit may or may not result in distribution of moneys received.

Congdon on General Average, 2nd Edition, p. 64;

An account of the meetings of the Conference of the International Law Association at

Stockholm, 1924, contained in a special article "York-Antwerp Rules 1924", 1924 A. M. C. Vol. 2, p. 13 of such special article.

(5) Benefits as well as losses must be taken at the port of destination. The new freight, a benefit received after the peril was met, must be credited pro rata to the cargo and vessel in the same manner as the losses are charged to them. *The ultimate benefits* to the ship and cargo *at the port of destination* is the measure of the values and must contribute in general average.

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 375, p. 547; Sec. 403, p. 575.

(6) The appellee's assignors, Smith, Kirkpatrick & Co., were entitled to the full space of the vessel as per charter party, their contract of purchase was also a purchase of the documents which included the charter party. They are therefore entitled to the entire freight on the new deck cargo subject to the equitable principles of general average.

The Port Adelaide, 62 Fed. 486 (CCA), 59 Fed. 174 (District Court).

(7) The master must be preserved as an impartial agent, unfettered by conflicting interests, when it devolves upon him to determine which interest is to be sacrificed.

The Mary F. Barrett, 279 Fed. 329.

(8) Appellee is not bound by the adjustment.

Minor v. Commercial Union Assurance Co., 58 Fed. 801.

Second: The District Court was correct in directing the prorating of the gross freight.

The appellant was bound to carry forward the saved cargo to destination.

Carver on Carriage of Goods by Sea, 8th Edition, p. 459.

The expense incurred in complying with that duty related to the saved cargo, and the gross freight received at the port of distress was properly prorated.

ARGUMENT.

THE INEQUITABLE ADJUSTMENT—PRELIMINARY STATEMENT WITH RESPECT THERETO.

Before proceeding with the discussion of the appellee's points, we call attention to the Statement of General Average. (Exhibit "D".) In that statement (transmitted to this Court as original exhibit, pp. 15 and 162), the average adjusters have taken as the contributing interests the value of the vessel at the port of destination, less the cost of the repairs at the port of distress, and the saved cargo at its market value at the port of destination, which included the freight paid at the port of departure. The freight paid at the port of departure was added to the value of the cargo as under the terms of the charter party it was considered earned, vessel or goods lost or not lost, which valuation is not questioned by appellee. The average adjusters, however, failed to credit the new extra freight received at the port of distress pro rata to ship and cargo, which presented the question of

law submitted to the trial Court. The losses set forth in the General Average Statement consist wholly of repairs to the vessel, it being conceded by the appellee that, under the York-Antwerp Rules of 1890 (by the terms of the charter party governing the adjustment), the jettisoned deck load was not entitled to contribution.

The effect of the Statement of General Average may be summarized as follows: By reason of the peril encountered by the vessel, a general average loss, consisting wholly of damage to the vessel, in the amount of Eight Thousand Three Hundred and Seventeen Dollars ($8317.00) was incurred (Adjustment, p. 159, transmitted to this Court as original exhibit), of which amount the owner of the vessel was charged with Three Thousand Six Hundred and Twenty-three and 40/100 Dollars ($3623.40), (Adjustment, p. 166), and the owner of the saved cargo the sum of Four Thousand Six Hundred and Ninety-four and 22/100 Dollars ($4694.22). The other repairs in the sum of Twenty-eight Thousand Three Hundred and Fifty-seven and 01/100 Dollars ($28,357.01) were not general average repairs, and the owner of the vessel received the benefit of the same by having them deducted from the contributory value of the vessel. (Adjustment, p. 162.) The benefits derived by the parties were considered by the adjusters as being the sound value of the vessel at Capetown ($75,000.00), less the cost of repairs, the ship being thus valued at $46,642.99. (Adjustment, p. 162.) The benefit to the saved cargo was considered as the market value at

Capetown, which included the prepaid freight. But *the adjusters failed to consider that the vessel received the benefit of $21,191.15 at San Francisco, the port of distress, for the new deck load shipped in the place of that which had been jettisoned.* If its general average contribution were deducted from this new freight, the vessel by reason of the jettison of the deck load would receive a clear profit of $17,567.75 by reason of the general average act, while on the other hand, the cargo owner not only loses his deck load with its prepaid freight which was jettisoned, but also the average contribution in the sum of $4694.22. That *the law of general average does not countenance such an inequitable adjustment,* is manifest from the authorities.

THE NEW FREIGHT SHOULD BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

1. THE NEW FREIGHT SHOULD BE CREDITED PRO RATA BETWEEN SHIP AND CARGO IN ORDER TO PLACE THE PARTIES AS NEAR AS MAY BE IN THE SAME RELATIVE POSITION WHICH THEY OCCUPIED BEFORE THE PERIL WAS MET.

The average statement would have been in order had the value of the ship at Capetown, South Africa, less the cost of repairs and the value of the remaining cargo saved by the jettison, plus the prepaid freight, been taken as the value of the contributing interests to the general average expenses and repairs, were it not that the venture earned a new freight at the port of distress. This element of the new freight was, however, not taken account of in the average adjustment, and the appellant was thereby given an ad-

vantage over the appellee, by reason of the general average act, in an amount equal to the new freight. *The interests were therefore not placed as near as might be in the same relative position which they occupied before the peril. To adjust the equities* and comply with the rule of contribution, the new freight must be credited pro rata to cargo and vessel so as to *place the parties on an equal footing* with regard to the general average *loss* and *benefits.*

Exemplary of this basic principle, we quote from the case of

The Strathdon, 94 Fed. 206, at 208,

cited with approval many times by the United States Supreme Court:

> "When in a sea adventure, the master of the ship or some person of equivalent authority, voluntarily and necessarily makes a sacrifice of the ship or cargo, in whole or in part, for the purpose and with the result of saving the residue, or the lives of those on board, from a common impending peril, the ship, cargo and freight earned must contribute proportionally to the part thereof saved towards making good the loss suffered and the expenses necessarily incurred thereby. The contribution is called general, gross, or extraordinary average. The Star of Hope, 9 Wall. 203; 3 Kent. Comm. p. 232; Ord. de la Mar (1683) bk. 3, tit. 7, and arts. 1-3; Birkley v. Presgrave, 1 East, 220, 228; Walthew v. Mavrojani, L.R. 5 Exch. 116, 120. *The broad and equitable nature of the rule primarily contemplates ratable contribution from all interests saved towards all interests sacrificed. * * * The spirit and intention of this law is to*

place the persons interested as far as may be, in the same relative position which they occupied before the peril was met, or 'in order to recoup the loser, and place him once more on a footing with his co-adventurers'. Macl. Shipp. (4th Ed.) p. 688. *This intendment involves necessarily reciprocity of obligation and right, mutuality in taking and receiving payment."*

The text books are almost unanimous in support of the maxims thus above propounded. To quote

Lowndes' General Average, 6th Edition, p. 358:

"The general principle of contribution may be summed up in one sentence: *it must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss; and on this amount which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute."*

Again, the same author at page 308:

"The ground of contribution to general average is benefit received. 'The whole law depends * * * on the loss of the one and the benefit to the other.' This principle can only be completely carried out by adopting ultimate results as the basis of settlement."

See

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 415, p. 592.

2. THE SHIP OWNER MAY NOT BY JETTISON BE IN ANYWISE A GAINER.

Gourlie, in his work *on General Average,* page 488, has stated:

> "The ship owner may not by the jettison be in any wise a gainer; therefore, if subsequent to the jettison, the vessel returns to the port of departure or puts in to an intermediate port in distress, and the missing goods are duplicated or fresh shipments received; the new freight earned by the carriage of these, cancels the loss that would otherwise arise from the original sacrifice. * * *"

This is the principle, among other equitable principles, upon which the present action was instituted, that "the ship owner may not by the jettison be in any wise a gainer". It is predicated upon an opinion rendered by the late Nathan H. Frank, reading in part:

> "I have before me a copy of the Adjustment of General Average on the above named Schooner, concerning which you desire my opinion as to whether or not said Statement of General Average is proper, in view of the fact that the vessel earned a new freight by reason of having put into a port of refuge, and said freight not being accounted for in said statement.
>
> "In my opinion the adjustment is incorrect.
>
> "Having put into a port of distress, a new deck cargo was substituted for that jettisoned and lost, and a new freight earned by the carriage of the subsequent cargo.
>
> "The ship owner, therefore, instead of having suffered a loss by reason of having put into a port

of distress, was a gainer to the extent of the excess of this new freight over and above the expenses incurred by putting into the port of distress.

"The following is the principle applicable to such cases, as stated by *Gourlie* in his work on General Average:

> " 'The ship owner may not by the jettison be in any wise a gainer; therefore, if subsequent to the jettison, the vessel returns to the port of departure or puts into an intermediate port in distress, and the missing goods are duplicated or fresh shipments received; the new freight earned by the carriage of these, cancels the loss that would otherwise arise from the original sacrifice. * * *
>
> " 'An absolutely prepaid freight does not *eo nomine* contribute, neither is it contributed for; but the cargo, at whose risk it has been placed, receives increased allowance thereby in case of sacrifice.'

"As there has been in fact no loss to the ship owner, but, on the contrary, there has been a gain to the ship owner, it seems to me that the cargo, which would be called upon to contribute to the loss, should, in justice and equity be allowed also to participate in the profits of such a deviation to the port of distress."

We would feel that ordinarily this opinion would not have place in the present brief, were it not for the fact that appellant has seen fit to offer an opinion by the late J. Parker Kirlin, where, in addressing his client, he advises that he did not think freight on new

cargo shipped to replace cargo jettisoned should be credited in general average, where the bill of lading provided that freight prepaid shall not be returned, goods or vessel lost or not lost.

Of course, it is not necessary to say that opinions of counsel are not authority except, perhaps, in so far as those counsel are recognized as men of ability and integrity in their calling. Mutual professional regard existed between Mr. J. Parker Kirlin and Mr. Nathan H. Frank, and they both were recognized as leaders in the field of admiralty practice. If Mr. Kirlin's opinion is to be given consideration, then at best it exhibits nothing more than a difference of opinion between counsel of like standing.

Mr. Kirlin's former associates have extended us the courtesy of furnishing a copy of the opinion referred to, which covers more than the one question presented in appellant's brief. Among those was one with relation to cargo transshipped after putting into a port of distress for repairs, in which Mr. Kirlin observes that the ship owner was in any event, after repairs made to its vessel, under obligation to either reload the cargo and carry it forward or bear the ratable expense of forwarding it. He then said:

> "The net freight on new cargo shipped in the space occupied by the cargo so transshipped must, therefore, in some form or manner, be accounted for in general average so as to offset wholly, or as far as it will go, the general average expenses in connection with the forwarding. The ship owner will be debited in the general average with his proportion of the cost of transshipment, but

> against this charge *he will receive a credit, through the medium of general average, of his ratable proportion of the net freight on the fresh cargo shipped in place of it,* which, presumably, will wipe out the debit."

We quote this because the appellant has stated (Brief, p. 7):

> "the District Court ordered the distribution of money received. There is no shadow of authority for such a course. It is contrary to the principle of general average."

At this point we will make comment on the quotation from *Lowndes on General Average,* 6th Edition, page 109, at page 14 of appellant's brief, which relates to the case of *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375. The quotation reads:

> "Here was a case in which the shipowner's gain of freight could not be brought in, in diminution of the merchant's loss."

This is apparently quoted by appellant as authority for its contention that the new freight received at the port of distress in the instant case, although the voyage was continued, is not to be credited in the general average. Not only, as appears from the statement on page 14 of the brief, was no question presented to the Court in the case of *Fletcher v. Alexander* on the subject, but the observation of Lowndes did not in fact relate to a situation such as exists in the instant case, a situation where the voyage was not terminated but continued to destination. Of course, if the voyage

was terminated, then any new freight received properly belonged to the shipowner, but if it was not terminated but continued to destination it did not, and this is all the comment of Lowndes amounts to, for we find in the opinion of Bovill, C. J., in the case of *Fletcher v. Alexander,* and we have before us the report of the case in *English Reports Annotated* (1868), pages 1 to 1616, at page 1513, the following:

> "The whole law is framed upon the principle of there being a loss to the one and a benefit to the other and the contributions being in strict proportion according to the loss sustained and the benefit derived. In this case the adventure, in consequence of the damage which the vessel and her cargo had sustained, put back to Liverpool. Of course the vessel might have been repaired and the cargo or such of it as remained, have been re-shipped, and the adventure have been continued, and the ship have prosecuted her voyage and completed the adventure. But a large portion of the cargo having been thrown overboard, the greater part of the remainder arrived in a damaged condition, and after it had been unloaded, the whole being in a state not fit to be forwarded, the charterers who had paid a considerable portion of the freight, and whose goods were in this state, did not think it worth their while to forward them, and the ship ceased to be in their employment; *so that the adventure,* so far as this matter is concerned, *must be considered to have terminated,* and the voyage to have been broken up at Liverpool, at the time and under the circumstances stated in the case. * * * The adjustment must take place according to the laws of England; and, as it seems to me, the

question of value must be determined with reference to *the adventure having terminated and the voyage being broken up* at Liverpool."

We therefore feel that the citation of the text of Lowndes on General Average is made under a misapprehension of the facts, and is not authority for the appellant's contention.

3. **THE NEW FREIGHT WAS EARNED BY A GENERAL AVERAGE ACT.**

The general average act:

The vessel "experienced heavy weather which caused her to leak and to jettison her deck cargo and to put in to a port of distress for the safety of the vessel and remaining cargo",[8] the jettison and change of course for a port of refuge occurring at the same time.[9]

Authority should not be necessary to support the assertion that the foregoing is a general average act. We, however, call to notice the statements on the subject found in the text of

Carver on Carriage of Goods by Sea, 8th Edition,

as follows:

With relation to jettison, the text in Section 375, page 547, states:

"The most familiar instances of general average sacrifices are jettisons—the casting overboard of cargo or stores in order to lighten the vessel.

8. Stipulation, Ap. 70-73.
9. Exhibit D, Statement of General Average.

> * * * The goods must be thrown overboard for the sake of all."

With relation to seeking a port of distress, the text at Section 403, page 575, states:

> "Where a deviation is voluntarily made to avoid the danger of going on in a ship which is so damaged that a continuance of the voyage is unsafe both for ship and cargo, the deviation is a general average act. It involves extraordinary additional expenses to the shipowner which are voluntarily incurred under the pressure of a common risk for the common safety. It is not a sufficient objection to say that it is the shipowner's duty to take these precautions and incur these expenses under his contract of carriage."

It is a mistaken position on the part of appellant, therefore, to contend that the new freight was not earned by any general average act. What appellant undoubtedly meant to say, so far as the jettison is concerned, was that while jettison was a general average act, the cargo jettisoned was not entitled to contribution because of the contract between the ship owner and the cargo owner, incorporating the York-Antwerp Rules of 1890, Rule 1 of which provides that no jettison of deck cargo shall be made good as general average.

By reason of the jettison of the deck cargo and simultaneously putting in to a port of distress, the vessel was enabled to obtain a new deck cargo and a new freight. Had the vessel not jettisoned her cargo and put in to a port of distress she would not have

been able to load a new cargo and obtain a new freight.

4. GENERAL AVERAGE DOES NOT ALONE RELATE TO CONTRIBUTION.

The suggestion is made in appellant's argument that general average relates alone to contribution in order to make good loss, damage, or expense (Brief, pp. 7, 13), and that the literature on the subject is barren of any suggestion that a receipt, gain or profit is to be distributed. Appellant is in error as to this. We call attention to the proposal at the Stockholm Conference of 1924 when the York-Antwerp Rules of 1924 were adopted. At that conference the following amendment to Rule XV, "Loss of freight", was proposed:

> "*When the voyage is continued, credit shall also be given for freight earned on goods carried in lieu of goods sacrificed,* less expenses actually incurred in earning such freight, including an allowance for extra detention of the vessel due solely to the engagement and loading of the new cargo."[10]

While the clause was not adopted, the meeting voting finally to eliminate it, it did so in the belief that the suggestion which it covered ought not to be put into a general rule, and that it was better in this respect to leave the adjuster free to act as might be best.

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10. That portion of the proposed clause not in italics is not relative to the contention of the appellant that the net freight should in any event be credited, and not the gross freight, as we shall hereafter indicate.

An account of the meetings of the Conference of the International Law Association at Stockholm, 1924, contained in a special article "York-Antwerp Rules 1924", 1924 A. M. C. Vol. 2, p. 13, of such special article.

So in fact the conference did recognize that general average contemplates not only contribution but credit for freight earned on goods carried in lieu of goods sacrificed.

The principle of crediting freight received on cargo loaded at the port of refuge in lieu of cargo sacrificed also carries with it the necessary consequence that if the freight received at the port of refuge is of such a substantial amount as to exceed the contributions which would otherwise be payable, then there must be a distribution under the equitable principles of general average by way of crediting the same to the vessel and the saved cargo pro rata.

We also call attention to

Congdon on General Average, 2nd Edition, p. 64,

where the author says:

"When a jettison or other sacrifice of cargo is made for the common benefit, new cargo is sometimes loaded in the space formerly occupied by the cargo sacrificed. If the original voyage is resumed and completed the net freight earned on the new cargo should be credited against the allowance for freight on the cargo sacrificed."

5. **THE NEW FREIGHT, A BENEFIT RECEIVED AFTER THE PERIL WAS MET, MUST BE CREDITED PRO RATA TO THE CARGO AND VESSEL IN THE SAME MANNER AS LOSSES ARE CHARGED TO THEM.**

In arriving at the values which should contribute in general average, prepaid freight must be added to the value of the cargo, and upon that value the cargo must contribute. The basis of this principle is that in the event of the loss of the ship and the cargo, the cargo, not the vessel, has lost the freight, as the value of the cargo upon payment of the freight, is increased thereby. The rule was taken by the English authorities from the general principle that general average contributions are to be governed by ascertaining how much better off is each of the contributing interests at the port of destination in the event of the successful arrival of the vessel than they would have been in case of a total loss. In discussing this principle which is designated as the English Rule,

> *Lowndes on General Average,* 6th Edition, p. 377,

remarks:

> "The argument in defence of the English Rule is, shortly, this: general average is a species of ransom from total loss, and the liability for it is to be determined by inquiring, not what party contracted beforehand, or supposed he was contracting, to pay it, but simply, who would have been the loser, and to what amount, had the ship been totally wrecked instead of being saved."

The appellee has no criticism with the application of the English rule by the adjusters in the case at bar in including the prepaid freight as a part of the value

of the cargo at destination *but it insists that the same principle must be applied in estimating the benefit to the ship at the port of destination by also ascertaining the amount that the vessel benefited by being saved from total loss.* If such inquiry is made, it appears that the vessel benefited to the extent of the new extra freight received at the port of distress in addition to her value at the port of destination.

The equity of the cargo owner's right to have the extra new freight received at the port of distress contributed pro rata between it and the ship is still further argued by the fact that in prepaying the freight at the port of loading under the charter party letting the whole ship, the cargo owner virtually stands in the shoes of an insurer to the ship of the full freight of the vessel. As an insurer of the full freight of the vessel the cargo owner would be entitled to have the new extra freight paid at the port of distress, credited to its liability for the full freight, as held in the case of

Barclay v. Stirling, 5 M. & S. 6, 105 Eng. Rep. 954,

where the Court had under consideration an action in assumpsit for money had and received. There the plaintiff had insured the freight on the Steamship "Neptune" from the port of Jamaica to London, the voyage described in the policy being at and from port or ports of loading in Jamaica to her port or ports of discharge in the United Kingdom with leave to call at all, any, and every one of the British and Foreign West India Islands, beginning the adventure from the

loading thereof, and providing that it would be lawful for the ship to discharge, exchange and take on board goods at any ports she may call at without being deemed a deviation. On the 30th of October, 1814, the vessel suffered an average loss whereby part of the cargo consisting of sugar, was lost and thereafter the ship put in to the port of Havana as a port of refuge for repairs, and took on board a new cargo to substitute for that which had been lost. The defendants, owners of the vessel, abandoned the freight to the plaintiff insurance company, who paid the full freight. On the 3rd day of May the ship arrived at London and the defendants received the freight for the substituted cargo for which this action was brought. In holding that the plaintiff insurance company was entitled to the new freight received at the port of distress, Lord Ellenborough states:

> "The ship being driven on the coast of Cuba by accidents of the voyage, this became a part of the voyage. And without considering it as a part of the voyage in the first instance, the liberty given to the assured to touch and take in goods at Cuba, incorporates this part of the adventure by necessary construction, with the voyage * * *. This then being freight, which the policy would have covered, had it remained at the risk of the assured, is not the assured a trustee for the underwriter if he receive it after abandonment? All the cases agree that he is, and that he is accountable for the subsequently received freight: *he cannot have both indemnity and freight also.* Therefore, the plaintiff is entitled in this case, deducting only such charges as belong to the freight,

such as the expenses of loading the cargo, and the wages of the crew during the loading."

In that case Bayley, J., also says:

"* * * I therefore think that the Havana freight was covered by the policy. It would be unjust to hold otherwise. The assured estimates the whole freight at 4200 pounds: *if one-half is washed overboard, and a fresh half substituted, why should he be allowed to earn the freight of half and put it into his pocket?* * * * And this action is not brought to recover back from the assured any part of that money which was paid him by the underwriter, *but to recover that portion of the freight which the assured has received after having been paid the full amount of his freight.* * * *"

See, also:

William R. Coe on General Average in the United States, p. 67;

Lowndes on General Average, 6th Edition, p. 783.

Anticipating that the appellant will contend that the new extra freight was uncertain at the time of the general average sacrifice and for that reason should not contribute pro rata to ship and cargo, we call attention to a like contention rejected in the case of

Williams v. The London Assurance Company, 1 M. & S. 318, 105 Eng. Rep. 119,

quoting the remarks of Lord Ellenborough, C. J., as follows:

"This is the case of an insurance on the outward voyage on a ship chartered for a voyage

out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter party is liable to contribute to general average. It is contended that the whole freight out and home is not liable; but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution: and the difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs. * * *"

In that case LeBlanc, J., also says:

"The stress of the argument for the plaintiff is this, that the contribution was uncertain at the time of the loss. But in all cases of contribution to general average, freight cannot at the moment of the loss be received, and therefore the contribution must be always uncertain; and yet in Da-Costa v. Newnham (2 T.R. 407), freight was determined to be contributory. *It is therefore not a decisive argument against its being contributory that the thing does not exist in certainty at the time of the loss* * * *".

The question therefore resolves itself into only one of whether the contributing benefits of the different interests are to be taken (1) at the time of the sacrifice, (2) at the port of distress, or (3) at the port of destination upon the successful termination of the voyage. In considering this point we find a stipulation in the charter party and the bills of lading providing: "with average as per York-Antwerp Rules, 1890".

One of the prerequisites to the right to contribution in general average is that there must be a successful termination of the voyage, on the ground that if the ship and her cargo successfully survive a storm by making a general average sacrifice and thereafter encounter another storm which destroys the vessel and her cargo, no interest has gained by the sacrifice and therefore no interest is to contribute. This condition precedent necessarily prescribes the rule that the port of destination must be the place where the *benefits and losses* to the interests must be computed, as held in the case of

Chellew v. Royal Commission of the Sugar Supply, 2 K.B. (1921) 627,

where the Court had under consideration an action by a shipowner for contribution in general average from the cargo owner for repairs made to the vessel at a port of distress. Upon a showing that the vessel and her cargo were lost upon the subsequent voyage from the port of distress to the port of destination, the Court in deciding that there was no right to a general average contribution, as there was no *ultimate benefit* to the cargo or ship at the port of destination, says:

"In my opinion the arguments in favor of taking the state of facts at the termination of the venture are more weighty, especially because: (1) The value of the property when it reaches the hands of its owners can be ascertained with precision. (2) There ought to be only one adjustment of the nature of general average. Endless confusion would result from a multiplicity of adjustments made on a multiplicity of different considerations. (3) *The whole law depends,* as was said in Fletcher v. Alexander, (L.R. 3 C.P. 375, 382), *on the loss to the one and the benefit, that is, in my view,* THE ULTIMATE BENEFIT *to the other.* * * *

* * * * * * *

"I agree with the conclusions stated by the learned arbitrator in para. 18 of the special case, which are as follows:

'(i) The right of a shipowner to contribution in general average is the same, whether his claim is for contribution to a general average sacrifice or for contribution to general average expenditure.

'(ii) *The extent of the right of a shipowner to contribution in general average is the same as the extent of the right to such contribution of any other party to the contract of affreightment.*

'(iii) *A claim to contribution in general average by any party to the contract of affreightment must be assessed upon the properties of all parties to that contract upon the values of such properties at the port of adjustment, and the port of adjustment,* if the voyage has not been abandoned at an earlier port, *is*

the port of the agreed destination under that contract.

'(iv) If the property of any party to the contract of affreightment who is called upon to contribute in general average to another party or parties has no value at the port of adjustment, either by its arrival in a worthless condition or by its not arriving at all, that party cannot be made to contribute.'

"I think (1) on the question of principle the law demands the loss of the one and the *ultimate benefit* of the other, and (2) on the question of practice certainty and convenience instead of confusion are to be obtained by one adjustment at the port of destination."

It follows from the foregoing, that *in the case at bar the ultimate benefits* at the port of destination included *the new* extra *freight received at the port of distress,* and that freight must therefore contribute pro rata to the vessel and the saved cargo.

6. **APPELLEE'S ASSIGNOR'S, SMITH, KIRKPATRICK & CO., WERE ENTITLED TO THE FULL SPACE OF THE VESSEL AS PER CHARTER PARTY. THEIR CONTRACT OF PURCHASE WAS ALSO A PURCHASE OF THE DOCUMENTS WHICH INCLUDED THE CHARTER PARTY. THEY ARE THEREFORE ENTITLED TO THE ENTIRE FREIGHT ON THE NEW DECK CARGO SUBJECT TO THE EQUITABLE PRINCIPLES OF GENERAL AVERAGE.**

In our statement of facts we, among other things, stated that on the loading of the original lumber cargo, the charterer sold the same C.I.F., with full shipping documents attached, to Smith, Kirkpatrick & Co., the assignor of St. Paul Fire & Marine Insurance Co., the appellee herein. This statement is founded on

the deposition of James W. Smith, the President of Smith, Kirkpatrick & Co., taken on behalf of the appellee, at pages 2 and 3 of the deposition. By inadvertence on the part of the appellee, the testimony was omitted from the requirements of the stipulation for the transcript on appeal herein.

Considering that we are entitled to a statement of the true facts, and feeling that counsel for appellant must be of like mind, we quote the portion of the testimony with respect thereto:

"Q. In May, 1920, did you purchase a cargo of lumber on the schooner 'Rosamond'?

A. The purchase preceded that.

Q. Shortly prior to May, 1920, you purchased such a cargo?

A. Yes.

Q. What was the voyage of that schooner?

A. From the Pacific coast to Capetown.

Q. From Fort Blakeley, Washington, to Capetown, South Africa?

A. Yes.

Q. From whom did you purchase that cargo?

A. Comyn, Mackall & Company.

Q. What were the terms of that purchase?

A. Why, it was subject to sight draft c.i.f., with full shipping documents attached."

The same witness also made an affidavit in the above cause, which is not part of the record, but is called to the attention of the Court for the same reasons as the testimony in the deposition above referred to. It reads in part:

"In May, 1920, Smith, Kirkpatrick & Co., Inc., purchased from Comyn, Mackall & Company a

> full cargo of lumber under deck and on deck, on the American Schooner 'Rosamond' from Port Blakeley, Washington, for Capetown, South Africa. Smith, Kirkpatrick & Co. purchased from Comyn, Mackall & Co. full c.i.f. documents including charter party covering the cargo and the voyage, which charter party had been made by Comyn, Mackall & Co. with the owner of the schooner. Under that charter party full freight was due and fully earned on the shipment of the cargo."

The stipulation of facts on which the cause was submitted recognizes the situation as testified to by the witness Smith, for it recites in its introductory portion:

> "Where the respondent's and cross-libelant's (Pacific Freighters Company's) vessel loaded an entire cargo of lumber including a deck load, belonging to libelant's assignor, (Smith, Kirkpatrick & Co.) as per charter party marked 'Exhibit A' and bills of lading in the form marked 'Exhibit B' * * *".

The charter party, under such a state of facts, as appellant must agree, was the contract between Smith, Kirkpatrick & Co., appellee's assignor, and Pacific Freighters Co., the appellant. Indeed, so far as the question of law is concerned, the appellant was in agreement with the appellee when it objected to the argument under the present heading presented to the lower Court. It, however, took the position on the facts that Comyn, Mackall & Co. were the charterers and therefore the bill of lading was the contract.

That Smith, Kirkpatrick & Co. was the party of the second part under the charter party, by virtue of the C.I.F. contract which carried with it the contract of charter party can hardly be gainsaid.

The charter party provides that the charterer shall have the "whole of the said vessel, including deck", and it further provides "that no goods or merchandise shall be laden on board otherwise than from the said party of the second part or their agent."[11]

As the assignee of the original charterer, Smith, Kirkpatrick & Co., appellee's assignor, was entitled to all the rights that the charterer had to the space in the carrying vessel. The space available as the result of the jettison was therefore the property of appellee's assignor and the freight on any cargo that was loaded therein was the freight of appellee's assignor.

Confirmation of this position is

The Port Adelaide, 62 Fed. 486, C. C. A., 59 Fed. 174 District Ct.

By the terms of the charter party in that case, the whole cargo capacity of the vessel was chartered to the libelant therein. The Circuit Court of Appeals for the Second Circuit held:

> "Under such a contract the master had no right without the permission of the libelant, express or implied, to use the vessel upon any part of the voyage for carrying cargo for third persons. Having done so, however, and earned freight thereby, the libelant, if he saw fit to adopt the

11. Charter Party, lines 10, 11 also Clause A, lines 24, 25; Ap. p. 74.

master's act, became entitled, upon the plainest principles of law to the freight earned."

Inasmuch as the new freight was earned as the result of the general average act, and as under general average, parties interested in the common venture may not profit one over the other by reason thereof, the new freight must be first subjected to the payment of the general average charges and the balance thereof divided between the parties to the venture—the ship owner, and the charterer, who is the cargo owner, the appellee's assignor.

As it did in the Court below, we anticipate that the appellant will attempt to distinguish the case of *The Port Adelaide,* on the basis that the charter in that case was a lump sum charter, and claim that in the instant case the charter is not lump sum, but for a unit price. However, such a criticism is not of avail, for the charter in the instant case is in fact a lump sum charter although it provides for a payment at so much per thousand feet. The payment stipulated for is, however, "for each 1,000 feet *shipped",* the word "delivered" having been stricken from the charter.[12] It further stipulates that the payment is "for the use of the said vessel during the voyage aforesaid". "The whole of said vessel including the deck * * * no goods or merchandise shall be laden on board otherwise than from" the charterer, the charterer to load a full cargo of lumber.

12. Charter party, Clause G; Ap. p. 74.

See

Poor on Charter Parties, Sec. 31, page 75,

and authorities there cited, as follows:

> "Section 31. *Lump sum freight.* When the freight payable is a lump sum for the voyage, the charter is in effect a hiring of the ship, and full freight is due though some of the cargo is lost on the voyage. The contract must clearly show that the freight is not to be paid on the amount of cargo delivered. But a stipulation that freight is to be paid upon the weight *intaken* shows an *agreement for a lump sum freight* even though freight is not payable until right delivery; and the same result is reached if the amount of cargo on which freight is to be paid is specifically stated in the contract."

See, also,

Christie v. Davis Coal and Coke Co., 95 Fed. 837; affd. 110 Fed. 1006.

Quoting the syllabus:

> "A charter of a ship to be loaded entirely with coal for a given port which provides for the payment of freight at so much per ton on the 'quantity intaken' is in the nature of a lump sum charter * * *."

7. THE MASTER MUST BE PRESERVED AS AN IMPARTIAL AGENT, UNFETTERED BY CONFLICTING INTERESTS, WHEN IT DEVOLVES UPON HIM TO DETERMINE WHICH INTEREST IS TO BE SACRIFICED.

There is another element in this case that should not be lost sight of. It is well expressed by the Circuit Court of Appeals for the Third Circuit in

The Mary F. Barrett, 279 Fed. 329:

"In the face of imminent danger, the law, as we have said, makes the master the agent of every part of the whole venture, to determine the question whether the sacrifice of any part may save the others. *The law having thus made the captain the agent of all, it follows that the law must make him an impartial agent; for it is evident that, if this law-imposed agent is by the law itself so fettered with partiality that if by doing nothing he can shield the ship from responsibility, and by acting he imposes responsibility on the ship, the law has created an agent whose bias unfits him for his work.* If the ship is seaworthy, and fault of navigation has, as in the present case, placed her on the rocks, and the master knows the ship is by the Harter Act not responsible for his negligence, *what but a biased mind can the master bring to deciding the question of jettison, if the law be that such jettison, if made, will subject the ship to pay the jettison loser in full, because of the fault which stranded the ship?* Such a construction would shear the master of the spirit of impartiality, fill him with the biased jaundice of interest, and unfit him to make the impartial sacrificial decision on which the safety of life, ship and cargo so often depend. *It is only by rejecting such construction, the law can inspire an impartial, disinterested master agent* with that 'honest intent to do his duty', which duty Justice Clifford bespoke for a master in The Star of Hope, 9 Wall. (76 U.S.) 203, 19 L. Ed. 638 * * *".

Applying this observation, so forcibly expressed, to the present case, we ask: "What but a biased mind

can the master bring to deciding the question of jettison", when he is faced with the alternatives of sacrificing ship's equipment and apparel on the one hand, or cargo (whether it be under deck or on deck, with freight prepaid considered earned)? Such a master, knowing that the freight on the cargo is earned in any event, might refrain from sacrificing his ship's equipment and apparel, and sacrifice the merchant's cargo by jettison, retaining to his owner the entire freight for the voyage, as well as his owner's vessel intact. Added to this, he would also have before him the facility of filling the space of the jettisoned cargo with new cargo on which new freight would be earned entirely for his owner's account. Such a master, if we but consider ordinary human failing, might readily be "an agent whose bias unfits him for his work", shorn "of the spirit of impartiality", filled "with the biased jaundice of interest" and unfitted "to make the impartial sacrificial decision on which the safety of * * * ship and cargo so often depend."

It is therefore imperative, not only in this case but in all cases of like character, that even though freight on cargo be prepaid considered earned, and the shipping contract call for the application of the York-Antwerp Rules of 1890, that freight received on new cargo shipped at a port of distress in space formerly occupied by jettisoned cargo should be credited in general average to the vessel and saved cargo. This is in consonance with the principle of the law of general average, and the decree of the lower Court is in

conformity therewith. Only thus can the master of the vessel be preserved as an impartial agent, unfettered by conflicting interests.

8. APPELLEE IS NOT BOUND BY THE ADJUSTMENT.

While the appellant has in its brief made no point with respect to the average agreement[13] signed before delivery of the cargo at destination, recognizing that it raised a question with respect thereto in the lower Court we will nevertheless briefly discuss the matters with relation thereto. The agreement contains the following proviso:

> "* * * provided that such losses and expenses shall be stated and apportioned in accordance *with the established usages and laws* in similar cases."

It is the position of the appellee that the findings of the adjuster are contrary to law, that they are erroneous. Under such circumstances the adjustment must be set aside. It is not binding on the parties thereto.

The Circuit Court of Appeals for this Circuit, in *Minor v. Commercial Union Assurance Co.*, 58 Fed. 801,

had under consideration the following stipulation:

> "We the undersigned do hereby consent that an adjustment of the loss on the barkentine Marion, which occurred February 18th, 1890, may be made by C. V. S. Gibbs, adjuster, on the following basis * * *. This stipulation applies to

13. Average agreement, Ap. 76-79.

general average adjustment only. *We agree to abide by adjustment made on above basis.*"

This Court held that where the adjusters had made an adjustment in a manner contrary to the law, it would be set aside, remarking:

"It follows as a conclusion from these premises that the adjustment was erroneous in assessing the contribution due in general average on the freight on its gross value, instead of taking one-half of such value, as provided by law; and the respondent is therefore entitled to a judgment dismissing the libel, and it is so ordered."

THE DISTRICT COURT WAS CORRECT IN THE PRORATING OF THE GROSS FREIGHT.

The appellant shipowner was bound to carry forward the saved cargo to destination. To quote from the text of

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 302, at page 459:

"If, however, the ship can be repaired without unreasonable sacrifice on the part of the ship owner, and funds for the purpose can be procured, then he is bound to repair her; and, having done so, *is bound to carry on the goods to their agreed destination.* He has not in that case been prevented, in a business sense, from performing his contract."

In refitting the vessel in order that she might go forward to destination, the appellant, notwithstand-

ing its suggestion on page 16 of its brief, not only did not expend the sum therein named for refitting her, but such expenditures as were in fact made were not for the purpose of carrying the new cargo forward. The expenditures as made were for account of carrying forward the saved cargo, in compliance with its legal obligation so to do. So, too, were the attendant expenses of the voyage necessitated by the obligation to go forward to destination. This being so, the District Court properly ordered the gross freight prorated, not the net freight.

Before concluding our brief, this Court is entitled to know that since the rendition of the interlocutory decree, appellee has been of the opinion that the appellant was judgment proof, and that therefore it was not warranted in going to the expense of further proceedings. It is for that reason that the present litigation covers such a considerable period of time. Appellee is still of the opinion that no judgment can be satisfied against the appellant. The appellant, however, seeking as it does a reversal of the decree herein and a recovery against the appellee on its cross-libel, brought the proceedings in the lower Court to finality.

CONCLUSION.

We respectfully submit that the decree of the lower Court, which ordered the prorating of the gross new freight between ship and salved cargo in accordance with the provisions of its decree, should be affirmed.

Dated, San Francisco,
November 3, 1939.

Respectfully submitted,
IRVING H. FRANK,
NATHAN H. FRANK AND IRVING H. FRANK,
Proctors for Appellee.